IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN
BENCH AT JAIPUR.

ORDER

R.P.SHRIVASTAVA VS. STATE OF RAJASTHAN & ORS.

S.B. CIVIL WRIT PETITION NO.9881/2005
Under Article 14,16 & 227of the
Constitution of India.

Date of order : October 13,2006

PRESENT

HON'BLE MR.JUSTICE R.C.GANDHI

Mr. R.N. Mathur]
Mr. Akhil Simlot], for petitioner.
Mr. G.S. Gill, Additional Advocate General
Mr. Bharat Vyas] Additional Advocate General - for the State.
Mr. Sanjay Pareek, for respondent No.4.
Mr.Ashok Gaur, for respondent No.5.
Mr.Maneesh Bhandari, for respondent No.6.

(Oral).

Petitioner, by means of this petition, seeks issuance of writ of Certiorari to quash the impugned order dated 25.11.2005 whereby some Rajasthan Police Service Officers (for short "RPS") have been promoted to Super Time Scale against the vacancies of the years 2002-2003, 2003-2004 and 2004-2005 and further for writ of Mandamus to promote the petitioner to the Super

Time Scale of RPS against the vacancy of the year 2002-2003. He further seeks direction to the respondent/State to ignore the down grading remarks recorded in the Annual Performance Appraisal Report (for short hereinafter referred to as “APAR”) of the petitioner, at the level of Accepting Authority and to place the petitioner in the Seniority List below Shri Sumesh Chand Kalla and above Shri Girdhari Lal Sharma.

Shorn of details, the grievances projected by the petitioner in the writ petition are that the petitioner was appointed in the Junior Scale of RPS vide order dated 26.10.1979. He was promoted to the Senior Scale of RPS on 24.05.1989. He could not be promoted to Selection Scale along with his counter-parts as his conduct was being inquired into under Rule 17 of the Rajasthan Civil Services (Classification, Control and Appeal) Rules, 1958 (hereinafter referred to as the “CCA Rules of 1958”) for minor penalty. He was considered by the Departmental Promotion Committee (for short hereinafter called as “DPC”) and his result was kept in sealed cover. He was exonerated of the charges and subsequently came to be promoted to the Selection Scale vide order dated 07.09.1998 retrospectively, with

effect from 20.09.1997. The petitioner was at S.No.11 of the Seniority List as per order dated 24.05.1989. In the promotion order dated 07.09.1998, the name of the petitioner has been directed to be shown below to Mr. Sumesh Chand Kalla, restoring his seniority position. He has been superseded in promotion to the Super Time Scale illegally and arbitrarily. It is further averred that Rule 28-A of the Rajasthan Police Service Rules,1954 (hereinafter referred to as the “RPS Rules of 1954”) provide criteria to be applied to determine the suitability of the officers for their promotion to the Super Time Scale. He has also relied upon the explanation appended to aforesaid Rule 28-A which provides that for purposes of selection for promotion on the basis of merit, no person shall be selected if he does not have “Outstanding” or ”Very Good” APAR at least of five years out of the seven years preceding to the year in which Departmental Promotion Committee is held. It is also stated that petitioner's APAR have been down graded without providing opportunity of advising, counseling and making representation as held in the case title ***U.P. Jal Nigam and others Vs. Prabhat Chandra Jain and ors. reported in AIR 1996 S.C.1661*** and also ignoring the

circular dated 3.4.1998 issued for the purpose by the respondent/State. For this reason, it is stated that the APARs which have been down graded without any notice,counseling and advise to the petitioner should have been ignored by the DPC and the supersession of the petitioner to the Super Time Scale against the vacancies of the year 2002-2003 is illegal,unreasonable and unjust. He has been denied the opportunity to make representation before the concerned authority for correction of the down graded remarks. The petitioner has also stated that his work and conduct has been appreciated by the senior officers consistently for a number of years and many commendations/certificates, while serving in Senior Scale, have been issued to him by his Superior Officers. These certificates have been appended with the writ petition as Annexure-4 to Annexure-20.

The petition was admitted on 24.01.2006. The respondents were served. Only respondent No.1 and 2 filed reply. Respondent No.5 did opt to file reply initially. The petition was set-down for hearing. On 14.09.2006 upon hearing submissions of the learned counsel for the petitioner, learned counsel for the

respondent/State was directed to produce the original record of the APARs of the petitioner for perusal of the Court. On 5.10.2006 again the arguments were resumed and the petition was directed to be listed on 6.10.2006. At this stage, perhaps on noticing the arguments of the learned counsel for the petitioner and the observations of the Court, the respondent No.5 Anand Vardhan Shukla, who, vide impugned order, has been promoted to the Super Time Scale superseding the petitioner, appeared through his counsel Mr. Ashok Gaur. Similarly, Mr. Girdhari Lal Sharma also appeared through his counsel Mr. Maneesh Bhandari. He filed an application for his impleadment as party respondent, which was not opposed by the learned counsel for the petitioner. He was impleaded as party respondent No.6. Both the respondents Nos 5 and 6 sought time to file reply,which was granted and they filed the reply. The respondents Nos.1 and 2 have filed reply jointly whereas respondents Nos.5 and 6 filed their reply separately.

The respondents Nos.1 and 2 in their reply have denied the claim of the petitioner for promotion to Super Time Scale against the vacancy of the year 2002-

2003 stating that the impugned promotions have been made by the respondent/State against the vacancies of the year 2002-2003, 2003-2004 and 2004-2005 on merit and do not suffer from any illegality or irregularity. It is denied by the respondents that down gradings were assigned to the petitioner in his APARs from time to time without recording any reason. The judgment delivered by the Apex Court in case title of **U.P. Jal Nigam and ors. Vs. Prabhat Chandra Jain and ors. (Supra)** has no application to the facts of the present case. So far as consideration of the petitioner against the vacancy of the year 2002-2003 is concerned, the petitioner according to the Seniority List did not fall within the zone of consideration, therefore, could not be considered. So far as the seniority of the petitioner shown in the Seniority List as stood on 1.4.1999 it is due to the judgment delivered by the Supreme Court in Ajit Singh Januja's case.

The respondent No.5 in his reply has submitted that the writ petition is not maintainable, as the petitioner has not impleaded all the promotees as party respondents in the writ petition. The petitioner has wrongly approached this Court invoking

extraordinary writ jurisdiction under Article 226 of the Constitution of India, as there is no violation of legal or fundamental rights of the petitioner. The petitioner should have first approached the Rajasthan Civil Services Appellate Tribunal,Jaipur,an appropriate appellate forum, created under the provisions of Rajasthan Civil Services Appellate Act which provides an alternative statutory remedy for adjudication of such grievances. The answering respondent has clean record. The petitioner was subjected to inquiry under Rule 17 of the CCA Rules of 1958 and rightly not granted the Selection Scale. The APARs of the petitioner were fully evaluated by the DPC vis-a-vis that of others and there is no violation of the circular of State Government issued for making assessment of the officer for recording of APARs.

The respondent No.6 in his reply has stated that the persons likely to be affected i.e. promotees have not been arrayed as party respondents. Even the answering respondent has been impleaded as party respondent at his instance. It is a case of non-joinder of necessary parties and the petition deserves dismissal. The petitioner has alternative efficacious statutory remedy available under the provisions of

Rajasthan Civil Services Appellate Act and should have exhausted it before approaching this Court. The claim of the petitioner for promotion to the Super Time Scale against the vacancies of the year 2002-2003 is not sustainable as the candidate eligible to seek consideration must possess five years APARs, outstanding or very good out of seven years preceding to the year in which the Departmental Promotion Committee is held. It is also stated that the reliance placed on the judgment of the Supreme Court delivered in case title **U.P. Jal Nigam and ors. Vs. Prabhat Chandra Jain and ors. (Supra)**, has no application to the case of the petitioner. Otherwise also, the issue pertaining to the recording of reasons for down grading the rating by the Accepting Authority, can be verified from the record of the petitioner maintained by the respondents. The petitioner has failed to take notice of the subsequent judgments of the Supreme Court on the issue and the claim projected by the petitioner on the basis of the judgment (supra) does not survive. The answering respondent has been awarded not only many commendation certificates but police medals also whereas the petitioner has only received the commendation certificates. The respondent has appended

these certificates with his reply as Annexures-R/6/1 and R/6/2.

Heard the learned counsel for the parties and perused the record.

Upon hearing the learned counsel for the parties and perusal of the record, the following points emerge for consideration of the Court and required to be dilated and addressed;

(i) Whether the writ petition is not maintainable as the petitioner has not exhausted alternative efficacious statutory remedy available before the Rajasthan Civil Services Appellate Tribunal.

(ii) Whether the seniority of the petitioner in the Selection Scale has been interpolated and wrongly fixed showing him below Mr.Sumesh Chand Kalla.

(iii) Whether the writ petition is not maintainable being suffering from non-joinder of the parties as all the promotees have not been arrayed as party respondents,

(iv) Whether the petitioner was not eligible to be considered in terms of his APARs or has been arbitrarily denied the right of consideration and that his APARs have not been recorded in terms of procedure prescribed by the State.

Learned counsel for the respondent has submitted that the petitioner is an officer of Rajasthan Police Service. The Government has created Rajasthan Civil Services Appellate Tribunal, Jaipur,in terms of the provision of Rajasthan Civil (Service Matters Appellate

Tribunals) Act, 1976 and the down grading of the APARs and denial of consideration for promotion should have been challenged before the said Tribunal by the petitioner. In support of his plea, he has placed reliance on Full Bench judgment of this Court delivered in case title **Tayyab Ali Vs. State of Rajasthan reported in RLR 1988(2) 1** wherein the petitioner filed writ petition before the High Court challenging adverse entry recorded in his APARS. The respondents at the very out-set took objection to the jurisdiction of the High Court to entertain the petition pleading that the efficacious alternative statutory remedy for redressal of grievances lies before the Tribunal, by way of an appeal invoking Section 2 (f) (ii) of the Act of 1976. The Division Bench of this Court referred the petition to the Larger Bench formulating the issue which reads as under:-

> "Whether an adverse entry in the Annual Performance Appraisal Report of the Government Servant will fall under Clause (v) of Section 2(f) of the Rajasthan Civil Services (Service Matters Appellate Tribunals)Act,1976 and the Service Appellate Tribunal will have the jurisdiction to entertain an appeal in the matter."

Learned counsel for the respondents have also relied upon the Division Bench judgment of this Court

delivered in case title **Laxman Singh Verma Vs. The State of Rajasthan and others reported in WLC 2000 (2) (Raj)11** wherein the writ petition filed by the petitioner was dismissed by the learned Single Judge on the ground of availability of an alternative statutory remedy against the order passed by the Joint Registrar, Co-operative Societies. The Division Bench, in appeal, while dealing with the existence of statutory alternative remedy, in para 16 of the judgment, observed as under:-

> "Thus, we are of the view that no broad proposition can be laid down that in all cases, where a writ petition has been admitted under article 226 of the Constitution of India, the Court will have no discretion at the time of the final hearing to relegate the petition to statutory alternate remedy available. The writ petition is admitted ex-parte . It is always open to the respondents to resist the writ petition on all available grounds including the ground of maintainability of the writ petition on the ground of efficacious alternate remedy available under the statute. **It is for the Court to consider exercising the sound judicial discretion as to whether at a particular stage, petitioner should be heard, notwithstanding the existence of alternate remedy or not.** No inflexible rule can be laid down in this regard. It is a mere matter of expediency. Normally where complaint is made against any act done or purported to be done under any statutory provision, the fact that there exists in the statute itself a possible

> remedy is an important fact to be taken for consideration and the Court will be extremely reluctant to interfere by way of high prerogative writ. Thus, it is essentially a question of fact to be decided in each case. Suffice to say that the tendency to bye pass alternate remedy must be discouraged and no body should be permitted to take advantage of his own wrong. In the instant case, the respondents at the earliest by filing the reply raised a preliminary objection with respect to the maintainability of the writ petition on the ground of alternate remedy. Petitioner got the writ petition admitted saying that similar writ petitions have been admitted. It is also to be noticed that though the learned Single Judge could have straight way rejected the petition upholding the preliminary objection that the writ petition was not maintainable in view of the statutory alternate remedy available, has protected the writ petitioner by giving a direction that if the appeal is filed within six weeks, the same shall be decided on merits expeditiously within a period of six weeks without taking the technical objection of limitation. In our view, in the facts of the case, learned Single Judge was justified in relegating the petitioner to statutory alternate remedy. While doing so, learned Judge has considered expedient to protect the petitioner, by giving appropriate direction. There is no obligation on the Court to give such protection, as such, it cannot be taken as precedent. It depends upon the facts of the each case. Thus, the order of the learned Judge calls for no interference by us."

In rebuttal, learned counsel for the petitioner relying upon the judgments of the Supreme Court in

cases title **Whirlpool Corporation Vs. Registrar of Trade Marks, Mumbai and others, (1998) 8 SCC 1, Smt. Shashi Gaur Vs. NCT of Delhi and others, (2001)10 SCC 445 (3), S.J.S. Business Enterprises(P). Ltd. Vs. State of Bihar and others, (2004)7 SCC 166 and L.K. Verma Vs. HMT Ltd. and Another, (2006)2 SCC 269** submitted that in these judgments the issue in controversy was whether the party shall approach first to the Tribunal exhausting alternative efficacious statutory remedy. Dealing with it, the Court in the Whirlpool Corporation's case(supra) observed as under:-

> "14. The power to issue prerogative writ under Article 226 of the Constitution is plenary in nature and is not limited by any other provision of the Constitution. This power can be exercised by the High Court not only for issuing writs in the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari for the enforcement of any of the Fundamental Rights contained in Part III of the Constitution but also for "any other purpose".
>
> 15. Under Article 226 of the Constitution, the High Court, having regard to the facts of the case, has a discretion to entertain or not to entertain a writ petition. But **the High Court has imposed upon itself certain restrictions one of which is that if an effective and efficacious remedy is available, the High Court would not**

> **normally exercise its jurisdiction.** But the alternative remedy has been consistently held by this Court not to operate as a bar in at least three contingencies, namely, **where the writ petition has been filed for the enforcement of any of the Fundamental Rights** or where there has been a violation of the principle of natural justice or where the order or proceedings are wholly jurisdiction of the vires of an Act is challenged. There is a plethora of case-law on this point but to cut-down this circle of forensic whirlpool, we would rely on some old decisions of the evolutionary era of the constitutional law as they still hold the field."

In case title **Shashi Gaur Vs. NCT Delhi and others (Supra) (2001) 10 SCC 445** the appellant was having remedy by way of an appeal before the Tribunal and despite that he approached the High Court.Objection was taken to the maintainability of the writ petition as the alternative efficacious statutory remedy was available. Dealing with it, the Apex Court observed in para 7 and 8 of the judgment as under:-

> "7.This judgment and the interpretation put to the provisions of sub-sections (2) and (3) of Section 8 undoubtedly is of sufficient force. **But, the question for our consideration would be that, would it be appropriate for us to give a narrow construction to sub-section (3) of Section 8 thereby taking the teachers whose services were terminated not by way**

of dismissal, removal or reduction in rank but otherwise, out of the purview of the Tribunal constituted under Section 11 of the Act. The statute has provided for a Tribunal to confer a remedy on the teachers who are often taken out of service by the caprices and whims of the management of the private institutions. The governmental authorities having been given certain control over the action of such private management, if an appeal to the Tribunal is not provided to such an employee, then he has to knock the doors of the court under Article 226 of the Constitution which is a discretionary one. **The remedy provided by way of an appeal to the Tribunal is undoubtedly a more efficacious remedy to an employee whose services stand terminated *after serving the institution for a number of years, as in the present case where the services are terminated after 14 years.***

8.In this view of the matter, we are persuaded to take the view that under sub-section (3) of Section 8 of the Act, an appeal is provided against an order not only of dismissal, removal or reduction in rank, which obviously is a major penalty in a disciplinary proceeding, but also against a termination, otherwise except, where the service itself comes to an end by efflux of time for which the employee was initially appointed. ***Therefore, we do not find any infirmity with the order of the High Court not entertaining the writ application in exercise of its discretion though we do not agree with the conclusion that availability of an alternative remedy ousts the jurisdiction of the court under Article 226 of the Constitution.***"

In case title **S.J.S. Business Enterprises(P). Ltd. Vs. State of Bihar and others, (2004)7 SCC 166,** the appellant therein by way of suit challenged the action of BICICO and obtained interim relief restraining the BICICO from selling the hotel. The next day, the writ petition was filed by him for the same relief as has been prayed in the suit. The interim order was also passed by the learned Single Bench. After hearing learned counsel for the parties, the learned Single Judge, dismissed the petition on the ground that the appellant had suppressed the fact that he had filed suit prior to initiation of the writ proceedings, his conduct verged on fraud and that the appellant had dis-entitled himself to any relief in the extraordinary prerogative writ jurisdiction. The Division Bench also dismissed the appeal holding that the Court would not interfere with the order of the learned Single Judge because of the material suppression of facts by the appellant. While dealing with the point as to whether in view of the fact that the suit was filed earlier and the writ petition was also filed before the High Court,the Division Bench was justified in maintaining the order of the learned

Single Judge. The Apex Court observed in para 14 of the judgment as under:-

> "14.Assuming that the explanation given by the appellant that the suit had been filed by one of the Directors of the Company without the knowledge of the Director who almost simultaneously approached the High Court under Article 226 is unbelievable (sic), **the question still remains whether the filing of the suit can be said to be a fact material to the disposal of the writ petition on merits. We think not.** The existence of an adequate or suitable alternative remedy available to a litigant is merely a factor which a court entertaining an application under Article 226 will consider for exercising the discretion to issue a writ under Article 226. But the existence of such remedy does not impinge upon the jurisdiction of the High Court to deal with the matter itself if it is in a position to do so on the basis of the affidavits filed. If, however, a party has already availed for the alternative remedy while invoking the jurisdiction under Article 226, it would not be appropriate for the court to entertain the writ petition. The rule is based on public policy but the motivating factor is the existence of a parallel jurisdiction in another court. But this Court has also held in Chandra Bhan Gosain Vs. State of Orissa that even when an alternative remedy has been availed of by a party but not pursued that the party could prosecute proceedings under Article 226 for the same relief. This Court has also held that when a party has already moved the High Court under Article 226 and failed to obtain relief and then moved an application under Article 32 before this Court for the same relief, normally the Court will not entertain the application

> under Article 32. But where in the parallel jurisdiction, the order is not a speaking one or the matter has been disposed of on some other ground this Court has,in a suitable cases, entertained the application under Article 32. **Instead of dismissing the writ petition on the ground that the alternative remedy had been availed of, the court may call upon the party to elect whether it will proceed with the alternative remedy or with the application under Article 226.** Therefore, the fact that a suit had already been filed by the appellant was not such a fact the suppression of which could have affected the final disposal of the writ petition on merits.
>
> 15. In this case, admittedly, the appellant has withdrawn the suit two weeks after the suit had been filed. In other words, the appellant elected to pursue its remedies only under Article 226. **The pleadings were also complete before the High Court. No doubt, the interim order which was passed by the High Court was obtained when the suit was pending.** But by the time the writ petition was heard the suit had already been withdrawn a year earlier. Although the appellant could not, on the High Court's reasoning, take advantage of the interim order, it was not correct in rejecting the writ petition."

In case title **L.K.Verma vs. HMT Ltd. and Another reported in (2006) 2 SCC 269**, the appellant-Safety Officer, an employee of the respondents therein, was placed under suspension and subsequently dismissed from service. The Appeal was preferred by the appellant

therein before the Labour Commissioner, which came to be allowed. The respondents approached the High Court despite existence of alternative remedy available to them. Objection was taken by the other side that in view of the existence of an alternative remedy, the respondents should have preferred an appeal against the order passed by the Labour Commissioner, therefore, the writ petition was not maintainable. Dealing with this issue, the Apex Court in para 20 of the judgment observed as under:

> "The High Court in exercise of its jurisdiction under Article 226 of the Constitution, in a given case although may not entertain a writ petition inter alia on the ground of availability of an alternative remedy, but the said rule cannot be said to be of universal application. Despite existence of an alternative remedy, a writ court may exercise its discretionary jurisdiction of judicial review inter alia in cases where the court or the tribunal lacks inherent jurisdiction or for enforcement of a fundamental right or if there has been a violation of a principle of natural justice **or where vires of the Act is in question.In the aforementioned circumstances, the alternative remedy has been held not to operate as a bar**."

From the aforesaid judgments, it is made out that where an efficacious alternative remedy is available,

ordinarily, the litigant must exhaust it before approaching the High Court. However, no judgment of the Supreme Court has been cited at the Bar, holding exclusion of jurisdiction of the High Court in exercising extraordinary writ jurisdiction under Article 226 of the Constitution of India. The judgments on this point has laid down the law that the High Court can also entertain the petition where either fundamental rights of the parties or the principles of natural justice have been violated. It has also been observed that it is a self imposed restriction by the High Court that it would not normally exercise the jurisdiction. Therefore, from all these narrations of law, it is not made out that the High Court should not or cannot entertain the petition as the existence of an alternative efficacious remedy ousts the jurisdiction of the court.

Coming to the present case, the petition was admitted in January,2006. It was set down for hearing. The promotee respondent despite service did not appear before the Court to defend himself. Only the respondent No.1 and 2 contested the petition by filing reply. The arguments were heard on 14.09.2006 and the

State/respondent was directed to submit the record of the APARs of the petitioner and the promotee respondents for perusal of the Court. Again the arguments were resumed on 5.10.2006, 6.10.2006 and 10.10.2006. Perhaps, noticing the projection of the case by the learned counsel for the petitioner and the queries made by the Court, the next day, respondent No.5 and 6 appeared through their learned counsel and sought time to file reply which was granted while the case was at the final hearing stage. In their reply, the respondents have taken the objection of maintainability of the petition before this Court on the ground of approaching this Court without first exhausting statutory alternative remedy.

Looking to the nature of the present case and the attending circumstances, particularly, the existence of efficacious alternative remedy, there is no doubt that if the Court in its discretion finds that the petitioner must approach the Tribunal, can pass such an order, which does not mean that the Court in exercising the extraordinary writ jurisdiction has no jurisdiction to entertain such a petition. Existence of alternative remedy does not exclude the jurisdiction of this Court.

While the case was being heard in absence of respondents Nos.5 and 6, no such plea was taken either by the State or by the other contesting respondents at that stage. This objection has been taken by the respondents Nos.5 and 6 when they entered their appearance at the stage of final hearing. If the petitioner, at this stage, is directed to approach the Tribunal, I feel that it shall be unjust and improper as the Court had already heard the case on behalf of the petitioner before the objection was taken by respondent No.5 and 6. Besides this, if this petition is decided,it will not cause any prejudice to the respondents and there is no institutional exclusion to entertain such a petition. Therefore, I hold that the Court has the jurisdiction to entertain and decide the petition despite the existence of alternative statutory remedy which do not ousts the institutional jurisdiction of the Court.

The second point is with regard to seniority position of the petitioner. Learned counsel for the respondents Nos.1 and 2 has fairly stated at the bar that alteration of seniority position of the petitioner is a mistake committed by the respondents showing the

petitioner at his wrongful place.

Learned counsel has submitted that the petitioner was promoted to the Senior Scale. He could not be promoted to the Selection Scale because of pending inquiry against him under Rule 17 of the CCA Rules of 1958. He was exonerated of the charges and vide order dated 07.09.1998 promoted to Selection Scale restoring his seniority position also. It is also submitted that while restoring the seniority, it was directed that the petitioner will be placed below Mr. Sumesh Chand Kalla which is apparent from order dated 07.09.1998 annexed as Annexure-2 with the writ petition. Mr. Sumesh Chand Kalla is at S.No.10 and the petitioner at S.No. 11 whereas Mr. Girdhari Lal Sharma is at S.No. 12. The respondents, thereafter, issued the seniority list on 1.4.1999 which has been annexed as R/2 with the reply. Mr. Sumesh Chand Kalla is at S.No.24 and Mr. Girdhari Lal Sharma at S.No.25 whereas the petitioner has been shown below to Mr.Girdhari Lal Sharma which is contrary to the order dated 07.09.1998. It is a serious lapse on the part of the respondents and how it has been happened by way of mistake is a matter of fact. The change of seniority position may be by mistake or

deliberately, the fact remains that it has caused serious prejudice and damage to the petitioner for consideration of promotion to higher post. The officer higher in seniority has the prior right of consideration and because of this wrong seniority position, the petitioner stood ousted from the zone of consideration of first five officers according to the seniority. If Girdhari Lal Sharma, who has been promoted, had been placed below to the petitioner, he would not have been falling within the zone of consideration, what to say of promotion. The stand of the respondents is that it has occurred by way of mistake appears to be of a dodge. It could be a case of mischief played by the dealing staff with the connivance of the officers beneficiary thereof. If it was the result of mistake, the respondents have not tender any explanation as to why and what prevented them to correct it. It is seen from the record that the petitioner filed representation on 1.12.2005 for correction of seniority list and to assign him rightful place as directed vide order dated 07.09.1998. Despite that the respondents have not bothered to rectify and correct it. Had it been a mistake committed, it would have been corrected deciding the representation filed

by the petitioner. Why representation was not considered, who were sitting over it, why the representation was not placed before the Departmental Promotion Committee, are all facts and need a prove in the interest of justice. Because of this mistake or mischief the petitioner has been deprived of his right of consideration according to his restored seniority position. Consideration for promotion is a fundamental right of the petitioner and seniority is a condition of service. His placement in seniority has been changed without any notice to him which violates the fundamental right and principles of natural justice. Petitioner, according to his service record, was entitled to be considered and non-consideration of the petitioner for promotion is also abrogation of fundamental right of the petitioner guaranteed under Article 14 and 16 of the Constitution of India.

It is the fundamental duty of the officials/officers to discharge their duties honestly and diligently and not to sit over the files. Assigning wrong place in the seniority list, non-consideration of the representation and non-correction of seniority list despite the attention of the concerned officers drawn by the petitioner by filing representation, amount to

misconduct on the part of the concerned dealing staff and the officers. It has not only caused grave injustice to the petitioner but also casts a cloud on honestly discharge of duty by the concerned, which needs to be unveiled to take action against such delinquents who have manipulated such record. They are required to be punished in accordance with the provisions of the service Rules.

The third issue is with regard to the maintainability of the petition for non-joinder of parties. Learned counsel for the respondents Nos.5 and 6 have stated in their reply and urged at the bar also that the writ petition is not maintainable because of non joinder of the parties as some of the promotees have not been arrayed as party respondents.

In the present case, the petitioner has challenged his non-consideration and promotion of Mr. Girdhari Lal Sharma, who has been promoted to the Super Time Scale vide impugned order dated 25.11.2005 against the vacancy of the year 2002-2003. He is before the Court as party respondent to defend himself. The respondents have also made selection for promotion to the Super Time Scale against the vacancies for the year 2003-2004,2004-2005. Since, the petitioner seeks relief

against one of the vacancy of these years also, he has arrayed Mr. Anand Vardhan Shukla as party respondent No.5, who is the last officer in the array of promotees. If the petitioner ultimately succeeds to the relief prayed for, he shall be entitled for promotion against one vacancy of a particular year and in that event the last promotee has to vacate the Post. Both these officers likely to be effected are on record as respondents Nos.5 & 6 to represent and defend their case before the Court. Therefore, I do not feel that the petition suffers from non-joinder of the parties.

The last point formulated is with regard to non-consideration of the petitioner by the Departmental Promotion Committee for promotion to the Super Time Scale.

The respondent No.6 in his reply has stated that the officer must earn five “Outstanding or Very Good” APARs out of seven years to be eligible to seek consideration for promotion. This claim of the respondents has been disputed by the petitioner submitting that instead of five years, the officer should have earned four years “Outstanding or Very Good” APARs out of seven years. The R.P.S. Rules of 1954 itself, stipulate eligibility for consideration.

Explanation appended to Rule 28A.(11) being relevant for the purpose is extracted below and reads as;

> "For the purpose of selection for promotion on the basis of merit no person shall be selected if he does not have "Outstanding " or "Very Good" record in at least five out of the 7 years preceding the year for which D.P.C. Is held."

Besides this, the respondents have issued Notification dated 30.11.1991 which was amended vide Circular dated 23.07.2003 and has been placed on record of the writ petition as Annexure-4.The Government vide Circular dated 23.07.2003, for all services of the State, has framed the Rules known as Rajasthan Different Services (Amendment) Rules,2003. Explanation of Rule-10 of these Rules prescribes that the candidate must earn at least 4 years "Outstanding" or "Very Good" APARs out of seven years. The assertion of the petitioner has been supported by the State/respondent also. Thus, it is made out that the prospective officer seeking consideration must have earned 4 years' "Outstanding" or "Very Good" APARs out of 7 years. The plea of the learned counsel for the respondent No.6 being misplaced has no force.

For recording the APARs,learned counsel for both

the parties have relied upon the instructions issued by the Government on 30.3.1976. Paras Nos 12 & 14 thereof read as under:

> **“Levels of Assessment**
>
> 12.(a) the assessment of an employee will generally be made at two levels(i) Immediate superior officer will the the reporting officer and (ii) the next higher officer (hierarchy) of the reporting officer will be the reviewing officer. Where however, higher officers are in the know of facts , and where they feel they should make some comments regarding the assessment of the officer reported upon,**they may record their own observations.”**
>
> **14. Responsibility of the Reporting Officer.**
> (i).....
> (ii) He should not only make an objective assessment of his subordinates' work and qualities but also give to his subordinates at all times the necessary advise, guidance and assistance to correct their faults. He should indicate, either verbally or in writing the defects which have been persisted despite his efforts to have them corrected. Adverse remarks shall be recorded in the Annual Performance Appraisal only when the reportee persistently fails to show improvement.
> (iii) While mentioning any faults/defects, the reporting officer must also give an indication to the efforts at

> reform made by him, by way of guidance, admonition etc. and the result of such efforts."

The above extracted para 12 prescribes that APARs should be recorded at two levels, the Reporting Officer and the Reviewing Officer. It does not speak about the Accepting Officer. The responsibility of the Reporting Officer during the reporting APARs is that he should not only make objective assessment of his subordinates, but also advise, guide and provide assistance to correct the faults if any committed by his subordinate. He should also maintain the record to show that despite his guidance and advice to correct the officer reported upon has not corrected himself or shown any improvement so that the adverse entries, under such circumstances, could be recorded in the APARs.

It is submitted that the APARs of the petitioner have not been recorded in the manner prescribed under Circular dated March 30,1976 relied upon by the the parties. Not only this, he has also stated in the petition that his APARs have not been recorded as per the mandate of the judgment delivered in the case title **U.P. Jal Nigam and Ors. Vs. Prabhat Chandra Jain and ors. (Supra).** The Court observed in para 3 of the

judgment as under:

> “We need to explain these observations of the High Court. The Nigam has rules, whereunder an adverse entry is required to be communicated to the employee concerned, but not down grading of an entry. It has been urged on behalf of the Nigam that when the nature of the entry does not reflect any adverseness i.e. Not required to be communicated. As we view it the extreme illustration given by the High Court may reflect an adverse element compulsorily communicable, but if the graded entry is of going a step down, like falling from 'very good' to 'good' that may not ordinarily be an adverse entry since both are a positive grading. **All what is required by the Authority recording confidentials in the situation is to record reasons for such down grading on the personal file of the officer concerned, and inform him of the change in the form of an advise.** If the variation warranted be not permissible, then the very purpose of writing annual confidential reports would be frustrated.....It may be emphasised that even a positive confidential entry in a given case can perilously be adverse and to say that an adverse entry should always be qualitatively damaging may not be true. In the instant case, we have seen the service record of first respondent. **No reason for the change is mentioned.** The down grading is reflected by comparison. This cannot sustain.”

In rebuttal, learned counsel for the respondents has submitted that the mandate of U.P.Jal Nigam has its restrictive applicability to the extent of the employees of the Jal Nigam and not for others as the

law laid down in this case has its bearing on the interpretation of the Rules governing the employees of the Jal Nigam. In support of his plea he has relied upon the judgment of the Supreme Court in case title **Union of India and Another Vs. Major Bahadur Singh reported in 2006 (1) SLR 66** wherein particularly in Para 6 of the judgment it is observed that U.P. Jal Nigam's case has no universal application which means it governs only the employees of the U.P. Jal Nigam. There is no doubt that there is substance in the plea of the learned counsel for the respondents to this extent. After this judgment, the Supreme Court in case title **State of U.P. Vs. Yamuna Shankar Misra and Another reported in (1997)4 SCC 7** while dealing with similar point of objectivity in writing the APARs, has observed with regard to the responsibility of the Reporting Officer and the Reviewing Officer. In this Case, adverse remarks for the year 1997-1998 and 1998-1999 were recorded in the confidential report and as consequence thereof officer was not promoted. He approached the Tribunal. The Tribunal quashed the APARs on the ground that it has been recorded due to malice. The High Court affirmed the order of the Tribunal. The State of U.P. approached the Supreme Court. On

considering the claim of the respondents therein, the Apex Court relying upon the judgments viz: (1964) 5 SCR 583,1994 Supp. (3) SCC 424, (1994) 1991 Supp. (1) SCC 600, (1996) 8 SCC 762 and (1996) 5 SCC 103 besides the judgment in the case of U.P. Jal Nigam and Others vs. Prabhat Chandra Jain and others, observed in para 7 of the judgment as under:

> "It would, thus, be clear that the object of writing the confidential reports and making entries in the character rolls is to give an opportunity to a public servant to improve excellence. Article 51-A(j) enjoins upon every citizen the primary duty to constantly endeavour to prove excellence, individually and collectively, as a member of the group. Given an opportunity, the individual employee strives to improve excellence and thereby efficiency of administration would be augmented. The officer entrusted with the duty to write confidential reports, has a public responsibility and trust to write the confidential reports objectively, fairly and dispassionately while giving, as accurately as possible, the statement of facts on an overall assessment of the performance of the subordinate officer. **It should be founded upon facts and circumstances. Though sometimes, it may not be part of the record, but the conduct, reputation and character acquire public knowledge or notoriety and may be within his knowledge. Before forming an opinion to be adverse, the**

> **reporting officers writing confidentials should share the information which is not a part of the record with the officer concerned, have the information confronted by the officer and then make it part of the record.** This amounts to an opportunity given to the erring/corrupt officer to correct the errors of the judgment, conduct, behaviour,integrity or conduct/ corrupt proclivity. If, despite being given such an opportunity, the officer fails to perform the duty, correct his conduct **or improve himself, necessarily the same may be recorded in the confidential reports and a copy thereof supplied to the affected officer so that he will have an opportunity to know the remarks made against him. If he feels aggrieved, it would be open to him to have it corrected by appropriate representation to the higher authorities or any appropriate judicial forum for redressal.** Thereby, honesty, integrity, good conduct and efficiency get improved in the performance of public duties and standard of excellence in services constantly rises to higher levels and it becomes a successful tool to manage the services with officers of integrity, honesty, efficiency and devotion."

Besides judgments of the Apex Court, the State has also issued a Circular dated 3.4.1998 for the purpose which reads as under:-

> **Sub: Downgrading of APAR ratings by the superior authorities-Reasons to be recorded.**

> "It has been observed that the APARs of the State Service Officers are sometimes downgraded by **Reviewing/ Accepting Authorities, without giving any reasons or justifications and it becomes difficult to properly defend** such cases in the courts. The Supreme Court has also recently held that proper reasons must be recorded while downgrading the APAR rating of a Reportee Officer.
>
> Accordingly, it has been decided that **the Reviewing/ Accepting Authorities should invariably record detailed reasons/justifications if APARs of the Reportee Officers are downgraded by them**."

The State/respondent has issued the aforesaid circular in the year 1998, adopting a particular pattern and manner for recording APARs. It has fastened the Reviewing Officer and the Accepting Authority to record the reasons for downgrading the ratings recorded by the Reporting Officer. The State has opted to follow the system of recording APARs of its own and is in vogue. These instructions and the judgments of the Supreme Court are complete answer to the plea of the learned counsel for the respondents.

To appreciate the rating/down grading of ratings, the record of the APARs was summoned, which was made available and have been perused. On seeing the record of the APARs, still a doubt persisting in respect of

appreciating APARs of the officers by the Departmental Promotion Committee as the APARs were not complete and the court wanted to know as to how such APARs has been appreciated and comparative merit derived. Learned Additional Advocate General was directed to produce the record of the Departmental Promotion Committee proceedings which has not been produced despite being available with the respondent/ State for taking the court also in confidence. Therefore an adverse inference is drawn against the State.

On perusal of APARs of the petitioner, it is seen that he has been rated as “Outstanding” and “Very Good” by the Reporting Officer and Reviewing Officer for the years needed to be considered for promotion. The Accepting Officer has outrageously and in violation of the Circular dated 3.4.1998 down graded the APARs, which could not have been down graded without recording detailed reasons/ justifications. He has recorded the down grading as if he is either not aware of the Circular or answerable to anybody. This conduct of the Accepting Authority is highly deplorable. He is an Officer of the Government and should have discharged his duty and conducted himself as a faithful Government

Officer while recording down grading of the APARs. The Circular was issued in the year 1998 and APARs were recorded thereafter; which are against the requirement of para 14 of the Circular. These down graded APARs amount to adverse entries for promotion. It cannot be done without recording reasons and communicating such entries and is required to be treated as expunged and pasted on. It is settled law that a particular act is required to be done in the manner as required and directed by procedure and law or not at all as laid down by the Supreme Court in case title **Hukam Chand Shyam Lal vs Union of India and others reported in AIR 1976 SC 789** observing as under:

> "It is well settled that where a power is required to be exercised by a certain authority in a certain way, it should be exercised in that manner or not at all, and all other modes of performance are necessarily forbidden."

Since the downgrading by the Accepting Authority has not been done according to the procedure and law, therefore,the down grading is not required to be taken into consideration for promotion, being not conveyed the adverse entries. For some of the years, the

Accepting Authority has not recorded any rating.

There is only one vacancy for the year 2002-03 against which respondent No.6 has been promoted. Five persons were considered. Petitioner being placed wrongly at S.No.6 in the Seniority List was kept out of consideration deliberately. Consideration has been denied to the petitioner by showing him at wrong place in the Seniority List as observed in preceding paragraphs.

From the aforesaid discussion, it is made out that respondent No. 6 Girdhari Lal Sharma has been wrongly promoted by manipulation,defeating the right of the petitioner of consideration for promotion. Girdhari Lal Sharma was not within the zone of consideration and thus not entitled to seek consideration for promotion. He has wrongly been promoted by creating false evidence of his placement in the Seniority List above the petitioner. Therefore, his promotion is set aside. Respondents are directed to consider the petitioner against the vacancy of the year 2002-03 falling vacant by ouster of Girdhari Lal Sharma. However, after the promotion of the petitioner if the respondents intend to adjust Girdhari Lal Sharma against the vacancy of

subsequent year, in that event, his promotion should not be disturbed. Against the vacancy of the years 2003-04 and 2004-05, if the petitioner is found required to be considered, in that event, the respondent No.5 has to vacate the Post as the petitioner has prior right of consideration being senior. It is again observed that on promotion of the petitioner, if the State/ respondents want to accommodate respondent No.5 also against the vacancy of the following year, they(State/respondents) are at liberty. The petitioner, on his promotion, shall be entitled to all service benefits retrospectively.

It has also been submitted at the bar that the DPC for selection and induction to Indian Police Service is scheduled to be held on 16th of this month. Since, direction has been issued for consideration of the petitioner and if the petitioner is promoted to the Super Time Scale, in that event, he, according to his merit, ranking and the Seniority position, is also required to be considered. Therefore, in the interest of justice and fair play, it is directed that the meeting of the Departmental Promotion Committee for induction to Indian Police Service scheduled to be held on 16th of this month shall be deferred till the

petitioner is considered by the respondents as directed by the Court. The respondents are directed to consider the petitioner within one month from the date the certified copy of the judgment is served upon the respondents so that the DPC proceedings are not delayed unnecessarily. If the petitioner is not considered within one month, the respondents shall be held accountable for delaying the meeting of Departmental Promotion Committee for selection and induction to Indian Police Service.

For the aforesaid reasons, the writ petition is allowed. No order as to costs.

(R.C.Gandhi),J.

om/